

Context Matters

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On [February 9th](#), the Armenian parliament authorized a referendum that would allow the Prime Minister of Armenia, Nikol Pashinyan, to remove seven of the current nine justices from the Constitutional Court. Pashinyan has called the decisions of the Court a “[threat to democracy](#)”. On its face, this seems like yet another example of a populist leader trying to use a referendum to increase his power. Examining the context of the situation in Armenia, however, paints a different picture.

Referenda have gotten a bad reputation in recent history. Whether the [2009 Swiss referendum](#) banning minarets, the [2016 Colombian referendum](#) that rejected the peace agreement, or the infamous 2015 Brexit referendum, referenda have been criticized as a means of using direct democracy to allow populism to undermine the rule of law.

This negative attitude has been compounded by the use of referenda by populist governments to bypass constitutional restrictions. The governments of [Hungary](#), [Poland](#) and [Turkey](#) have all used or attempted to use referenda to increase their constitutional powers. It is in these settings when referenda become most concerning as there are [almost no international legal requirements](#) for referenda, and even the Venice Commission’s [Code of Good Practice on Referendums](#) spends less than a page on the substance of a referendum.

Armenia’s Prime Minister Nikol Pashinyan – Popular, but far from a Populist

This referendum is not an impulsive decision. Pashinyan has spoken about the need for [transitional justice mechanisms](#) since coming to power in mid-2018. To understand this, it is important to know Armenia’s recent history.

Armenia’s entire political system was upended in the summer of 2018 with the Velvet Revolution. The Velvet Revolution saw over 100,000 Armenians pour into the streets to oppose the previous President, Serzh Sargsyan, who was attempting to stay in power beyond the constitution’s two-term limit. Sargsyan had masterminded a [2015 referendum](#) that shifted key powers of the Presidency to the position of the Prime Minister. Then days before his term would end, he announced that he was stepping into the Prime Minister position despite saying earlier that he had no intentions to hold on to power. This move is not unlike how Erdogan had powers shifted to his position as President or Putin’s holding onto power regardless of his title as President or Prime Minister. The Armenian people rejected this *en masse* and forced Sargsyan to resign, clearing the way for Pashinyan, a former parliamentarian and the main protest organizer, to become Prime Minister.

When Pashinyan took power, he remade Armenia's political space by focusing on anti-corruption. One of his largest accomplishments was forcing oligarchs to pay taxes, increasing the state budget by a whopping [43%](#) in two years. He removed [corrupt figures](#) from key positions and fought the culture of corruption in Armenia's public sector that had persisted since the Soviet era. And, the Minister of Justice brought charges against the former President, Robert Kocharyan, over the killing of 10 protesters on [March 1st, 2008](#), killings that shocked the country and inspired an era of political fatalism. These actions resulted in Armenia being named The Economist's [Country of the Year in 2018](#).

Pashinyan has been willing to go against his base when he believes it is necessary. Armenia has a history of polluting mining operations, and Pashinyan's [activist base](#) sought to block a new gold mine. The problem is that Armenia had already signed agreements with the mining company and breaking the contract would have resulted in liability for hundreds of millions of dollars in investor-State arbitration. Ultimately, Pashinyan bucked his activist base and [approved](#) the mining project.

The Constitutional Court fulfilling its Mandate or Protecting a Political Ally?

The Constitutional Court has persistently impeded Pashinyan, [particularly](#) regarding the prosecution of former President Kocharyan. The seven members of the Court that Pashinyan wants to remove were appointed either by Kocharyan or his political ally Sargsyan. The President of the Constitutional Court was Minister of Justice under Sargsyan and was instrumental in drafting the 2015 referendum, after which he was appointed to the Constitutional Court. Pashinyan alleges he has evidence that the Court's President was appointed through [fraud](#). While there is undoubtedly an air of impropriety in how the President of the Court was appointed, closer scrutiny is required to assess the allegation of illegality. However, any legal assessment would be a constitutional question, meaning the Constitutional Court would have to rule on one of its own members. The Court has already refused to do just [that](#).

To complete the transition away from the Soviet-designed system, Pashinyan knew that reform required judicial reform. His first [attempt](#) to do so in May involved popular protests wanting the forced resignation of judges whose judgments are found by the European Court of Human Rights to violate Armenia's human rights obligations. While raising the political stakes, his actions did little to resolve the legal situation. The government's 2019-2023 Judicial and Legal Reform Strategy, which was [approved](#) in October, outlined changes to the constitution. And, a poll conducted in September and October [found](#) (page 35) that 82% of the public believes judicial reform is either important or the highest priority, giving his idea for a referendum democratic support.

But does democratic support translate to democratic legitimacy? When does the political removal of oppositional judges promote rather than undermine the rule of law? Are Armenia's Constitutional Court justices simply protecting a political ally or

are they fulfilling their mandate? I can provide no clear answer, but I can suggest one factor that must be considered: context.

Armenia's Political Context and its Trajectory

What is the relevant context that one should consider? I highlight three areas: international indices, foreign relations, and domestic perspectives. International indices provide the most objective assessment of the current government. Foreign relations demonstrate whether the country's allies are supportive or concerned about domestic affairs. Regarding foreign relations, I'll focus exclusively on foreign relations with the EU as a proxy to assess how much Pashinyan has promoted European norms like the rule of law. Finally, a domestic perspective is an essential component to governmental legitimacy.

Democracy indices

The International Institute for Democracy and Electoral Assistance (International IDEA) conducts yearly reviews of States and evaluates the health of their democracy. Two of the attributes of their democracy index are "Representative Government" and "Checks on Government". In 2017, Armenia received scores of .48 and .43, respectively. Both scores are at the bottom of the "mid-range" of European States. Post-revolution, Armenia's "Representative Government" score jump to .54 and its "Checks on Government" score skyrocketed to .59, a .16 point increase. [The Global State of Democracy 2019](#) report shows Armenia's staggering increase in the "Checks on Government" attribute (page 226). The same report positively described Armenia as "the only country in Europe to transition from being a hybrid regime in 2017 to a democracy in 2018. It also recorded the highest number of statistically significant advances in Europe for 2018: on Checks on Government, Impartial Administration and Participatory Engagement, and on eight related democratic subattributes" (page 212).

The Economist Intelligence Unit's (part of The Economist magazine) gave Armenia a democracy index score of 4.11 in 2017, 4.79 in 2018, and 5.54 in 2019. Their [democracy index report for 2019](#) concluded that Armenia's "improvements [to accountability, transparency and public confidence] were consolidated and peaceful political activity became possible without government interference" (page 32). Armenia jumped three ranks higher than neighboring Georgia, which is often pointed to as the best representative of European values in the Caucasus.

Foreign relations with the EU

Pashinyan has been actively negotiating better relations with the EU such as visa-free travel to Europe for Armenians or the Armenia-EU Comprehensive and Enhanced Partnership Agreement (CEPA). CEPA will obligate Armenia to adopt a [wide range](#) of EU norms. It was signed in November, and at the time of writing, [21 EU States](#) have ratified it.

Working on the periphery of CEPA, Armenia and the EU have worked together to further strengthen their relationship. Armenia [signed](#) three financial agreements with the EU, which will unlock €65 million to use for implementation of CEPA. The EU also recently [removed](#) Armenia from its “gray list” of non-cooperative tax jurisdictions.

Domestic perspective

The perspective of the domestic populace is essential to the legitimacy of a government. The straight-forward pitfall is to use popularity as a synonym for legitimacy, as majority support does not mean that core democratic norms are not being eroded. A superior metric is the perception of corruption within a country because it provides a more neutral metric to judge a government's adherence to the rule of law. I recognize the metric is not perfectly politically neutral as someone who supports a government is likely to perceive it as less corrupt.

Transparency International's Corruption Perceptions Index gave Armenia a score of 35 in [2017](#) and [2018](#), putting Armenia 107 out of 180 countries. But in [2019](#), the score jumped to 42, moving Armenia up 30 ranks to be tied with Bahrain compared to previously being tied with Egypt. A [survey](#) released on the 21st of February found that 75% of those asked did not think Pashinyan was corrupt. In contrast, only 6% believed that there wasn't widespread corruption under the previous regime.

Taking Account of Facts

There is no clear rule to assess whether a referendum will promote or undermine abstract concepts like the rule of law. The best approach is to examine the domestic political situation – and its trajectory – to assess the legitimacy of a referendum. Rule of law approaches tend to focus on principles rather than facts. Principles are universal while facts are messy and complex. But it is context that distinguishes this referendum from the populist referenda we have seen in Hungary or Poland that are undoubtedly aimed at undermining the rule of law.

While I cannot say whether a yes or a no vote would be a better outcome for Armenia, I do believe the context of Armenia's revolution makes it democratically legitimate to allow the Armenian polity to answer the question.

